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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

APR 24 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of Section 309(j) of the)	MM Docket No. 97-234
Communications Act -- Competitive Bidding)	
for Commercial Broadcast and Instructional)	
Television Fixed Service Licenses)	
)	
Reexamination of the Policy Statement)	GC Docket No. 95-52
on Comparative Broadcast Hearings)	
)	
Proposals to Reform the Commission's)	GEN Docket No. 90-264
Comparative Hearing Process to Expedite)	
the Resolution of Cases)	

To: Chief, Audio Services Division, Mass Media Bureau
Reference No. 1800B3-TSN

OPPOSITION TO PETITION FOR RECONSIDERATION

Galaxy Communications, Inc. ("Galaxy"), by its attorneys, hereby opposes the petition filed on April 10, 2000, by Anchor Broadcasting Limited Partnership ("Anchor") in the above-captioned proceeding.¹ Anchor requests that the Audio Services Division reconsider its letter ruling ("Letter Ruling") dated March 9, 2000. In its Letter Ruling, the Divi-

¹ Anchor's pleading is not germane to rulemaking proceedings of general applicability. Anchor neglected to ask the Commission to adopt the procedures under which it would like to be operating now. The time for seeking reconsideration in the captioned dockets has long since passed. Because Anchor failed to raise this issue at a time when procedures for deferral of the bid amount might have benefitted other bidders, the relief sought by Anchor relates only to its mutually exclusive application for a new FM station in Selbyville, Delaware. Accordingly, Anchor's petition should have been filed in the Selbyville comparative proceeding. Galaxy brought this error to the attention of Anchor in its Opposition to Petition for Declaratory Ruling. Galaxy has retained the improper caption used by Anchor solely in order to ensure that this opposition will be associated with the original pleading.

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sion refused to exempt Anchor -- either by declaratory ruling or by waiver² -- from payment obligations that Anchor had incurred pursuant to the Commission's Closed Broadcast Auction No. 25 ("Auction 25").³ For the reasons which follow below, the Division should deny reconsideration of its Letter Ruling.

Background

As a preliminary matter, we note that Galaxy, Anchor and Susan M. Bechtel ("Bechtel") were among the original applicants for a construction permit for a new FM station in Selbyville, Delaware (the "Selbyville Permit"). These three applicants were the only competitors for the Selbyville Permit when the Commission eventually designated the Selbyville frequency for auction, a decision which Bechtel challenged before the D.C. Circuit Court of Appeals ("*Bechtel* Litigation").⁴ On at least two subsequent occasions, Anchor had ample opportunity to invoke the *Bechtel* Litigation as a basis for flexibility in the payment timetable established by the Commission. Anchor failed to comment on this issue prior to

² Anchor has not repeated its rationale for a waiver in any depth. Accordingly, Galaxy merely incorporates its arguments against such a waiver by this reference to its prior Opposition to Petition for Declaratory Ruling. Suffice it to state here that Anchor's situation does not meet the test that the Commission has applied in past cases.

³ *Pet.* at 1.

⁴ In view of the consolidation of several cases by the D.C. Circuit, Anchor refers to this litigation as the *Orion* case. See *Petition* at 4. Galaxy continues to refer to the case as the *Bechtel* litigation in order to remain consistent with prior pleadings.

April 20, 1999, when the FCC released its Memorandum Opinion and Order⁵ establishing the timetable for payment in connection with auctions of broadcast spectrum. Furthermore, Anchor failed to petition for reconsideration of the April 20 *Order*.

Bechtel refrained from participating in the auction, evidently preferring to focus on her legal challenge to its legitimacy. Thus, Galaxy and Anchor remained as the only competitors in FM MX Group 26 of Auction 25. During Auction 25, *based in large part on the payment timetable established by the FCC in its auction procedures*, Galaxy determined that it could not justify a bid higher than the \$210,000 bid submitted by Anchor. The auction closed with Anchor as the high bidder for the Selbyville Permit. No petitions to deny were filed against Anchor's application. Anchor submitted its petition for declaratory ruling on December 14, 1999, precisely *one day* after the deadline for filing petitions to deny against Anchor's application for the Selbyville Permit. Anchor failed to serve Galaxy with a copy of its petition. These facts suggest a very strong possibility that Anchor participated in Auction 25 in bad faith, never intending to honor its payment obligation in accordance with the terms under which its bid was made.

Anchor, in its petition, claims that it faces effectively the same situation as if a petition to deny had been filed against it. Anchor also alleges that the relief which it seeks is limited in scope. However, Anchor has failed to address the distinction -- made by the Division in

⁵ See *Implementation of Section 309(j) of the Communications Act*, Memorandum Opinion and Order, 14 FCC Red 10,030 (1999) ("April 20 *Order*").

its Letter Ruling -- between the impact of litigation before the courts and the effect of a petition to deny before the Commission. In addition, Anchor has seriously underestimated the scope of the relief it seeks. Finally, Anchor has failed to articulate adequately how the relief which it seeks would not be manifestly unfair to a competing applicant such as Galaxy.

I. Anchor Failed to Refute the Division's Distinction Between Anchor's Situation and Those Faced by Parties Whose Qualifications as Licensees Have Been Questioned.

Anchor acknowledges the distinction made by the Division in its Letter Ruling. *Petition* at 2. However, Anchor insists that the uncertainty that Anchor confronts still warrants the same treatment as if a petition had been filed to deny its application. *Id.*

In fact, Anchor had assumed the risk of this uncertainty long ago, by constructing and operating the facility at issue. Thus, even amid all of the "uncertainty" of which Anchor complains, it is actually receiving all the benefit from the ongoing operation of the station.

In any event, Anchor has confused correlation and causation. If, as Anchor alleges, the *Bechtel* Litigation presents Anchor with *some degree* of uncertainty, the mere fact that those faced with a petition to deny are confronted by a degree of uncertainty is not alone cause for the Division to grant the exemption sought by Anchor. In its Letter Ruling, the Division demonstrates one cause for the exemption extended to parties facing a petition to deny -- that doubt has been cast as to the qualifications of a potential licensee. Anchor's

petition does not refute this distinction. Standing alone, it still presents a sufficient rationale⁶ for the Commission to limit to those parties against whom a petition to deny has been filed the right to defer payment of their bid amounts. The most important distinction, however, is that all parties to the Selbyville auction were already aware of the court appeal *before* they placed their bids, whereas no one could necessarily anticipate the filing of a petition to deny.

II. Anchor Seriously Underestimates the Scope of the Relief Which It Seeks.

Anchor claims that a decision in the *Bechtel* Litigation could be announced as soon as July, thereby making the relief which it seeks inconsequential, inadvertently points to another important distinction between the uncertainty presented by litigation before the courts and petitions to deny. The question raised by a petition to deny -- that of a potential licensee's qualifications -- is well within the FCC's authority to decide. *Deciding such questions, in fact, is the Commission's mandate.*

On the other hand, the outcome of the *Bechtel* Litigation is outside of the Commission's jurisdiction. Thus, the Commission has little if any influence on the length of a delay occasioned by the *Bechtel* Litigation, which is before the courts. In contrast, the timetable for resolving a petition to deny is within the scope of the FCC's authority.

As for the substance of Anchor's claim that any delay occasioned by the exemption which it seeks would be inconsequential, Anchor too conveniently neglects to state the

⁶ Anchor alleges that the Division's distinction "seems unreasonable." *Petition* at 2.

obvious. The results of the *Bechtel* Litigation, even if decided as soon as July, could easily be appealed to the Supreme Court. Even if the Supreme Court refused to hear the case, that decision would not likely be announced until fall *at the earliest*. Such a delay would constitute significantly more than what Anchor characterizes as the “minor accommodation” that it seeks. *Petition* at 6.

Further, Anchor alleges that the potential refund of its money -- in the event that Bechtel prevails -- would constitute an “administrative nightmare.” *Id.* However, the FCC issues refunds routinely. To the knowledge of Galaxy, other parties have not experienced “administrative nightmares” obtaining refunds. Anchor also insists that its situation is so peculiar that the relief it seeks does not affect any other applicants. *Id.* at 3-5. However, Anchor ignores the problems that would flow from a precedent exempting an applicant from the Commission’s payment deadlines merely based on a degree of uncertainty in connection with the permit it seeks.

If Anchor can receive a post-facto change in circumstances at Galaxy’s expense, simply by relying (after the auction) on “special circumstances” that existed prior to the auction, then any applicant could participate in an auction without real economic constraint. In this instance, Galaxy would have bid higher in Auction 25 if it had thought that it could forestall payment on its obligation indefinitely. A grant of Anchor’s exemption request

would undermine the integrity of the auction process by eroding all confidence in the payment deadlines established by the Commission prior to auction.

III. Anchor Has Failed to Articulate How the Relief it Seeks Would Not Be Manifestly Unfair to Competing Applicants.

Anchor has failed to show how the relief it seeks would not constitute a *post-facto* advantage to Anchor only. Anchor was aware of the *Bechtel* Litigation prior to the commencement of Auction 25 but did nothing to secure a deferral of either the auction date or payment date based on the “uncertainty” to which it is subject until a time when an exemption could no longer benefit Galaxy equally. Throughout Auction 25, Galaxy prepared to bid -- and to honor the payment obligations it would have incurred had it not been outbid by Anchor -- in full awareness of the uncertainty to which Anchor alludes. Anchor, by its participation in the auction, effectively represented that it was also prepared to honor the payment obligations that would result, fully aware of the pendency of the *Bechtel* appeal.

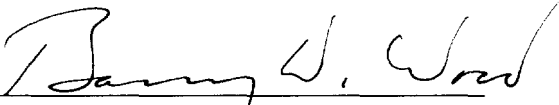
The Division’s position, as expressed in the Letter Ruling, is that Anchor is expected to honor its commitment in a timely fashion. This is necessary not only to provide justice to runner-up bidders like Galaxy, but also to successful bidders in other cases, who must pay regardless of the eventual outcome of the *Bechtel* Litigation. In sum, Anchor has presented no valid reason for the Division to reverse the determination set forth in the Letter Ruling.

Conclusion

Anchor has failed to demonstrate that its situation warrants the exemption that it seeks. Moreover, Anchor cannot prove that the exemption, if granted, would not have broad consequences. Finally, Anchor articulates no adequate rationale to explain how the grant of the relief sought would not be manifestly unfair to Anchor's competing bidder. Accordingly, the Division should deny Anchor's petition for reconsideration.

Respectfully submitted,

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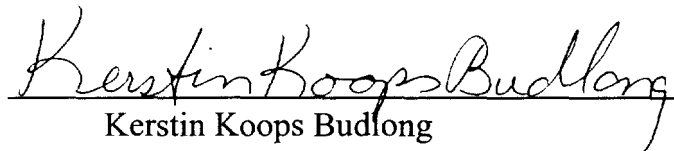
Dated: April 24, 2000

CERTIFICATE OF SERVICE

I, Kerstin Koops Budlong, hereby certify that on this date I caused the foregoing "Opposition to Petition for Reconsideration" to be served by U.S. first class mail, postage prepaid, on the following:

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